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No._____

IN THE

Supreme Court of the United States

October Term, 1931

CARBON COUNTY LAND COMPANY,
a corporation,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Carbon County Land Company, a corporation, complains of the decree of the United States Circuit Court of Appeals of the Tenth Circuit, rendered in that court on January 14, 1931, and respectfully petitions for a writ of certiorari to review the same as against the United States of America, respondent above named. (R. 592).

EFFECT OF DECREE: The decree ordered and directed by the Circuit Court of Appeals cancels and annuls all right, title and interest of the State of Utah in and to the land which is the subject of this litigation. This decree holds that: (1) the State of Utah is bound in equity by a decree entered in a suit to which the State of Utah was and could not have been made a party without its consent; (2) that the statute of limitations barring actions to vacate or annul grants

of lands made by the United States enacted for the purpose of making safe and secure the title to such lands, may be avoided by an action commenced to impress such land with a constructive trust, and letting the decree therein have the effect of a reconveyance; (3) that an act, honest when done, can be made fraudulent by a retroactive application of a rule adopted ten years after the commission of the act; (4) that after a sovereign state had acquired and held for fully sixteen years valid and legal title to public lands, such state had no right, power or authority to transfer and convey such title so legally held and acquired by it; (5) that this petitioner by said decree was denied the right to acquire through a valid lawful transaction, property owned, possessed and acquired by a sovereign state; (6) that if said decree is allowed to stand, then petitioner is wrongfully denied the right, in a valid legal transaction, to purchase and acquire lands from a sovereign state, and to receive from said state its patent therefor.

JURISDICTION OF THE COURT: This application for a writ of certiorari is made under section 240 of the Judicial Code (U. S. C., Title 28, Section 347.) The land involved consists of 5564.28 acres situate in Carbon County, Utah. These lands under the evidence, and in view of the various agreements entered into as they are shown by the record, are of the approximate value of $100.00 per acre, or $556,428.00. The questions of law involved are of vital importance, not only to this petitioner, but to the State of Utah and all persons acquiring title to lands by the various land grants to the State of Utah. If the decision of the Circuit Court of Appeals is sustained, then there is no security or repose in the title to a great portion of the land in the State of Utah, and the effect and purpose of the statute of 1891 has been denied its full force and effect, and titles secured thereby are in jeopardy, and the statute as interpreted in U. S. v. Winona, 165 U. S. 463, is without force and effect.

The Decree of the Circuit Court of Appeals is final. The rights of the State of Utah in and to the lands involved are cancelled and annulled, and the patent granted by the state to your petitioner was held void, and that no rights were acquired thereunder by your petitioner. As the decree stands nothing remains for determination.

STATEMENT OF FACTS.

Under and pursuant to the floating grant contained in the Enabling Act of July 16, 1894 (28 Stat. 109), the 5564.28 acres of land involved in this controversy were selected by the officers of the State of Utah, and, after a due and regular investigation by the Commissioner of the General Land Office of the United States at Washington, and with the approval of the Secretary of Interior, the titles to said lands were certified to the State of Utah between the years 1901 and 1904, and one Stanley B. Milner, and other persons associated with him, entered into a contract with the State of Utah for the purchase of said lands at the price of $1.50 per acre. Said contract of purchase was then assigned to your petitioner, a corporation in which Stanley B. Milner owned approximately all of the capital stock.

At the time of the purchase of said lands, and according to the rule then being enforced by the General Land Office of the United States, said lands were classified as nonmineral in character because there were no exposures of any coal having commercial value on any subdivision of the land selected and certified. The rule then and for many years prior thereto in force provided that "lands cannot be classified as coal lands unless commercially valuable coal is exposed on each legal subdivision of 40 acres proposed for sale." This rule had been uniformly recognized for many years in land department decisions. Nearly two years after the lands involved had been selected by the State of Utah, and title thereto in the usual manner had been certified by the government to the State of Utah, Joseph A. Taff, a government geologist, under date of September 7, 1905, called attention to this rule to W. A. Richards, then Commissioner of the General Land Office, and said:

> "To this rule the local United States Land Office and State Land Board have been and now are subject. * * *"

He then suggested that this rule prevented a proper classification of coal lands, and recommended that the rules governing their selection be changed. Replying to this communication under date of September 18, 1905, Commissioner Richards, in a letter to the Secretary of the Interior, called

attention to numerous decisions upholding the then existing rules, and among other things stated:

> "It will be seen from the decisions referred to that the department and the courts have always held that there must be an actual discovery of mineral, in some quantity at least, upon the land under investigation before it can be held to be mineral in character."

And he concluded his communication as follows:

> "Any changes in the general practice would be far reaching in its effect, and it is recommended that the detailed report treating all specific tracts of Messrs. Taff and Hare be awaited, and that when filed it be given consideration with a view to such action on the point raised as may then seem just to the government, the state, and to individual claimants." (Gov. R. 370-7)

This agitation resulted in the establishment of the doctrine of geologic inference as set forth in the case of Diamond Coal & Coke Company v. United States, 233 U. S. 236, and upon this decision the lands involved in this controversy were found to be mineral in character in 1914 (Milner v. United States, 228 Fed. 431, 248 U. S. 594).

The United States commenced an action on January 7, 1907, against the Milners and your petitioner for the cancellation of said contracts of sale, alleging that the lands were mineral in character and did not pass under the grant to the State, and that the certifications from the United States to the State of Utah had been procured by fraudulent misrepresentations, and that by reason thereof the certifications so made were void, and that the possession of the lands should be restored to the United States, and all clouds on the title of the United States be removed.

This suit was tried in January, 1910, but was not determined by the Trial Court until June, 1914, a short while after the final decision of this Court in the case of Diamond Coal & Coke Co. v. United States, 233 U. S. 236, decided April 6, 1914. The decree of the Trial Court in the Milner case decreed the United States to be the owner and entitled to the

possession of the lands involved and quieted its title against the defendants and their privies to that suit and perpetually enjoined the defendants from thereafter asserting any claim to said lands. This decree was affirmed by the Circuit Court of Appeals November 15, 1915. (228 Fed. 431) Appeal dismissed. (248 U. S. 594)

The State of Utah was not made a party to the Milner suit and could not be made a party because the Trial Court had no jurisdiction to determine the rights of the State of Utah in said litigation without its consent. It might have intervened but did not,—perhaps because the Special Assistant to the Attorney General who commenced and carried on the Milner suit, appeared before the State Land Board of the State of Utah on the day following the institution of the Milner Suit, and assured the State Land Board that the United States sought nothing further by said suit than to set aside the Milner contracts and to relieve the State from such contracts, and that if the government won the suit the title to the land would be in the State, and that the government did not seek to deprive the State of its title. (R. 245-6) No further proceedings or transactions were had with reference to said land until the year 1920, when your petitioner entered into a separate, independent and new contract with the State of Utah for the purchase of said lands, at $100.00 per acre, or the sum of $555,428.00, to be paid as follows: $100,000.00 on or before January 2, 1930; $200,000.00 on or before January 2, 1940; and $256,428.00 on or before January 2, 1950. This indebtedness was evidenced by promissory notes secured by a mortgage covering the land. All of the notes bore interest on and after January 2, 1925, at the rate of 5 per cent until maturity, and 8 per cent thereafter until paid.

Thereupon, your petitioner entered into possession of said lands, and in October, 1920, sold 1120 acres of the land in question to the Independent Coal & Coke Co., a corporation organized under the laws of the State of Wyoming, receiving therefor 365,000 shares of the capital stock of said company having a par value of $365,000.00, and an actual value of 60 cents per share, and the purchaser assumed an indebtedness of $112,000.00 standing against 1120 acres of land in favor of the State of Utah. This contract was ratified by the State of Utah.

Thereafter on May 16, 1924, the United States brought this action against your petitioner and the Independent Coal & Coke Co. The bill sought to have your petitioner and the Independent Coal & Coke Co. declared constructive trustees of the land involved, and to have the parties ordered to reconvey title to the land to the United States. The Trial Court dismissed the bill on the ground that the relief was barred by the Statute of Limitations. Upon appeal this ruling was reversed. (United States v. Carbon County Land Co., 9 Fed. (2d) 517.)

This court then granted a writ of certiorari and permitted the State of Utah to appear in support of the writ. The decision of the Eight Circuit Court of Appeals was affirmed by a divided court. (274 U. S. 640)

On the return of the mandate to this Court to the United States District Court for the District of Utah the original bill of complaint was amended. The State of Utah then intervened, pleaded and set up its mortgage.

The United States, after making unsuccessful objections to this intervention on the part of the State, then filed its answer to the complaint in intervention and also its counter-claim. In this counter-claim it claimed title to the land, and prayed, among other things, that the Court adjudge and decree that the certifications of said land "so made to the State of Utah, as hereinbefore pleaded and set out, be delivered up to be cancelled, and that the Court, by its decree, cancel and annul the same". (R. 84-5)

REPLY OF STATE: To this counter-claim, the State of Utah replied, denying in substance that the lands were of a known mineral character on May 9, 1904, or at any time prior thereto, and alleging that said lands were classified as non-mineral, and that never, at any time until the commencement of the action on January 8, 1907, had the United States pretended or claimed that said lands were of a known mineral character. Said reply re-affirmed the allegations contained in its complaint in intervention, and finally alleged that the cause of action set forth in the counter-claim of the United States was barred by virtue of the provisions of Section 8 of the Act of Congress dated March 3, 1891, which in substance provides that all actions to vacate or annul patents shall be commenced within six years after the date of the issue of such

patents. The State of Utah then prayed "that the United States take nothing by reason of said counter-claim; that said counter-claim be dismissed for want of equity, and * * * that the lands described in said counter-claim and in the complaint of the plaintiff be decreed to the State of Utah, and that the State of Utah be decreed to be the absolute owner of said lands, both legal and equitable, as against all claims of the United States" and for general relief. (R. 89)

Upon a hearing, the Trial Court entered a decree that the State of Utah is, as against the United States, the owner of the land in controversy, but decreed that the patent dated February 10, 1920, issued by the State of Utah to this petitioner, be and the same is hereby adjudged to be void and of no effect.

The Circuit Court of Appeals, by its opinion and decision, reversed the decree as against the State of Utah, holding that it should operate as a cancellation of the lien of the mortgage held by the State, or of any liens thereon, and that the title of the United States should be quieted, and that the State or anyone claiming under it should be enjoined from asserting any claim to the title or possession of the premises, and that the title held by your petitioner be impressed with a trust in favor of the United States, and that petitioner should account for the use of the lands since 1920.

SUBSTANCE OF DECISION OF COURT OF APPEALS

The holding of the Circuit Court of Appeals, in reversing the judgment of the District Court, is predicated upon the following propositions: (Opinion R. 592)

1. That the lands here involved were known mineral lands and not subject to grant by the United States.

2. That the title thereto was procured from the Government by material misrepresentations of facts.

3. That the Government attacked the proceedings by which its certifications were procured by a proceeding in a court of competent jurisdiction within six years prescribed by Section 8 of the Act of March 3, 1891.

4. That the six-year limitations prescribed by the statute is not a bar to this action as far as it seeks to impress a trust on the titles held by your petitioner and the Independent Coal & Coke Company, and that the two companies hold the legal title to these lands.

5. That the decree of the Trial Court is contrary to the decision of this Court in that it granted no relief to the Government as against your petitioner or the Independent Coal & Coke Company.

6. That because the State had parted with its title, and its interest was thereafter represented by a purchase money mortgage, then as the mortgagee therein it held under your petitioner, and that the State of Utah was a privy in title to your petitioner, and was therefore bound in equity by the decree of 1914, entered in a suit to which the State was not a party and to which it could not have been made a party without its consent.

7. That although the cross-bill of the United States against the State prays for a cancellation of the certifications made by the Government, still the primary relief sought against the State is the same as that against the Companies, viz: to impress a trust on such title as it has, in aid of the 1914 decree, and the statute therefore does not bar the action.

8. That the State has no just claim to these lands, and that the State's position in this case "is not entirely worthy of it." (Quoting Court's opinion.)

9. That the decree of 1914 does not merely set aside the contract of sale made between the State and the Milners, but prevents the Milners and their successor, your petitioner, from asserting any claim under the certifications which they have fraudulently procured. (Ignoring the fact that your petitioner is a corporation, that it did not participate in any fraud in the securing of the certifications, and then denied it the right to purchase the lands from the State of Utah years after the original contract, in a new, separate and independent transaction.)

10. That the United States is not estopped by reason of the representations of the Special Assistant Attorney General of the United States, made to the State Land Board in 1907;

that only the Congress of the United States could provide for the disposition of the lands of the United States.

11. That the United States was not guilty of laches because there was no reason for it to act until the State of Utah asserted its claim to these lands by issuing a patent.

12. That while the Milners were not guilty of actual fraud, and no moral turpitude is imputed to them, still in a legal sense the lands were fraudulently obtained, and that the decision involved in the original suit and rendered in 1914 is binding upon the Court of Appeals.

SPECIFICATION OF ERRORS.

Your petitioner assigns and specifies error as follows:

1. That the Circuit Court of Appeals erred in holding that as to the State of Utah, the land involved were known mineral lands, and erred in ignoring the fact that said lands were by the standard of law, in force at the time of the certification by the United States to the State of Utah, non-mineral in character, and erred in failing to apply the standard of law which existed at the time of the certifications were made by the United States to the State of Utah, and for the same reason erred in finding that there was a material misrepresentation of the facts as to the character of said land.

2. That the Court of Appeals erred in holding that the Government attacked the proceedings by which the certifications were procured by an action in a court of competent jurisdiction within the six years prescribed by Section 8 of the Act of March 3, 1891,—it being conceded that the attack made by the Government was merely upon the Milners and your petitioner and not upon any title held by the State of Utah.

3. That the Court erred in holding that the six-year limitation prescribed by the statute can be avoided by an action seeking to impress a trust when, as a matter of fact and law, it cannot be avoided by an action which seeks to vacate and annul a patent or a certification.

4. That the Court erred in failing to appreciate that the impressment of a constructive trust, accompanied with

a reconveyance of the title to land, is in all respects the legal equivalent of and necessarily includes the vacation and annulment of the patent, certification, or other muniment of title, and in failing to appreciate that the creation of a constructive trust by the court, as against a grantee, contains within it, as an essential prerequisite to its existence, the vacation and annulment of the grant in whatsoever form.

5. That the Court erred in failing to appreciate that the Statute of Limitations is a meritorious defense and the prime essential and basis foundation to every valid title, and that such statute was enacted for the purpose of creating a right, accompanied by its resulting repose and security, rather than for the mere purpose of barring one form of a remedy and allowing the right to be destroyed by adopting another mere form.

6. That the Court erred in failing to give effect to the interest of the State of Utah in the land involved, which interest was the entire purchase price of said land; and erred in failing to appreciate that the State of Utah was still in law seized of the land involved, to the same extent as it has been at any time since the certifications were made by the United States.

7. That the Court erred in holding that the State's rights in the land came from or were held under your petitioner, and in failing to recognize that the State's rights in said land came from the United States, under and pursuant to the Enabling Act of July 16, 1894; and erred in concluding that the State of Utah was a successor to your petitioner, and erred in failing to appreciate that the State was charged by the United States to the full extent of the acreage involved, in partial satisfaction of the grant made in said Enabling Act.

8. That the Court erred in holding that the State is "under the peculiar circumstances and under the doctrine of the Williams case, bound in equity" by the decree of 1914, when it is conceded that not only was the State not a party to the suit in which that decree was made, but that it could not have been made a party without its consent.

9. That the Court erred in failing to appreciate that the State as well as the United States is clothed with and entitled to the immunities and privileges of a sovereignty, and

that while the United States can convey its lands only by means of the rules provided by its Congress, the State of Utah can convey its lands only by means of the rules provided by its legislature, and that neither of the sovereignties can do more or less than follow its law.

10. That the Court erred in holding that the primary relief sought against the State of Utah is to impress a trust on the title to the land involved, in aid of the 1914 decree, because no trust could be nor was any imposed upon the State of Utah by the Circuit Court of Appeals.

11. That the Court erred in holding that the State has no just claim to these lands, and in intimating that the State's position "is not entirely worthy of it", because it appears from the record that these certifications made by the United States to the State have for more than twenty-five years been treated by both the State and the United States as a partial satisfaction of the grant made in the Enabling Act.

12. That the Court erred in holding that the decree of 1914 had any other or greater effect than to annul the interest of Milner and your petitioner as it existed at the time of the entry of that decree; and erred in assuming that this Court intended to hold that your petitioner could not, by means of a new, fair and lawful transaction, buy this land from the State if it was the owner thereof, or from any other person who might own said land.

13. That the Court erred in holding that the United States was not estopped by reason of the representations of the Special Assistant Attorney General who was conducting the Milner suit in behalf of the United States, made for the evident purpose of inducing the State not to intervene in said suit; that now to claim that the State is concluded by the decree entered in the Milner suit permits the United States to reap an unjust advantage from the misconduct of its representative.

14. That the Court erred in holding that the United States was not guilty of laches, because, regardless of its legal effect and legal consequence, the conduct of the United States in suffering the long delay before commencing its action of 1924 was from any standpoint inexcusable and highly detrimental to both the State and to every citizen thereof.

This question might well have been settled years ago had the United States assumed a different attitude.

15. That the Court erred in applying to the conduct of the Milners between the years 1901 and 1904, which was in accord with the then existing legal standards, another legal standard not created or conceived until 1914, and by this error in effect, through a retroactive application of the new standard, transformed an honest act into a fradulent one.

16. That the court erred in failing to apply the six year Statute of Limitations prescribed by Section 8 of the Act of March 3, 1891, in favor of the State of Utah, thereby denying to the State title to the lands involved.

17. That the court erred in refusing to recognize that the legal title to the lands involved vested in the State of Utah after the issuance of the certifications, the Government never at any time having denied or questioned that the State held such legal title.

18. The court erred in failing to recognize the legal title to the lands involved in the State of Utah, and by so doing sought to vest the Government with authority to control the rights of a sovereign state in its private dealings and transactions with individuals or corporations, and in violation of Article 10 of the Amendments to the Constitution of the United States, which provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people".

19. The court erred in refusing to set aside that portion of the judgment of the Trial Court wherein it was decreed that "the State patent dated February 10, 1920, issued by the State of Utah to this petitioner, be and the same is adjudged to be void and of no effect", thereby violating the constitutional rights of your petitioner to purchase and acquire the land in question in a lawful, valid and legal transaction.

REASONS FOR ALLOWANCE OF THE WRIT.

Your petitioner respectfully submits that the present case is one in which this Court should issue a writ of certiorari for the following reasons:

1. That the rights of this petitioner are inseparably connected with the rights of the State of Utah, and should be considered in connection therewith.

2. In this case the United States appealed from the judgment in favor of the State of Utah, and your petitioner appealed from the judgment decreeing that the patent issued to it by the State of Utah be adjudged void and of no effect. These appeals were heard, considered together, and one opinion rendered January 14, 1931, determining all of the questions involved. To secure a full and complete review of such issues justifies the issuance of the writ prayed for.

3. There is a real controversy between the State of Utah and the United States. This controversy, however, directly involves the rights of this petitioner, as it deraigns its title to the lands in question from the State of Utah. Because of the sovereign character of the State of Utah and of the United States, and because of the provisions of the Constitution providing for the original jurisdiction of this court in suits where the State is a party, such controversy should not be determined without a review by this Court. No other Court than this Court could acquire jurisdiction of a controversy between the United States and the State of Utah without the consent of each of said parties. That consent has been given by the United States bringing this suit, and by the State voluntarily intervening therein, and particularly by the United States filing its counter-claim against the State, and the State replying thereto. Considering, therefore, only the character of these two parties, it is submitted that the judgment complained of should be reviewed, and in this review the rights of your petitioner must of necessity be considered.

4. But, disregarding the character of the parties, and looking only to the character of the questions involved, the great and transcendent public importance of the decision of the Circuit Court of Appeals, it is submitted, compels a review by this Court because the decision of said Court makes uncertain and insecure the titles to real estate, especially within the State of Utah and throughout all the public land states. All titles rest more or less upon a repose resulting from the Statute of Limitations, and when once it is held that Section 8 of the Act of March 3, 1891, can be avoided by an action seeking to establish an implied or constructive trust as contradistinguished from an action for formal annulment of a

patent, then the purpose of that statute has failed, or has ceased to operate, and the title to land has become insecure and its acquisition fraught with great danger. This is fully illustrated in this case, wherein this petitioner in good faith entered into a new, separate, independent contract, obligating itself to pay the State of Utah $556,428 with interest, and thereafter sold to the Independent Coal & Coke Company, an innocent purchaser, 1120 acres of the land involved, receiving therefor 365,000 shares of its capital stock of the par value of $1.00, and the Company assuming a debt to the State of Utah of $112,000.00.

5. The decision of the Court of Appeals, holding that the State of Utah is bound by the decree entered in favor of the United States and against your petitioner, et al., in the year 1914, is in conflict with the decisions of this Court and in conflict with the general law, because the State was not a party to the suit which resulted in said decree, and because the State could not have been made a party to such suit without its consent.

Wood v. Davis, 7 Cranch, 271, 3 L. Ed. 339;
Brandon v. Ard, 211 U. S. 11, 53 L. Ed. 68;
Kapiolani Estate v. Atcherley, 238 U. S. 119, 59 L. Ed. 1229;
Tindal v. Wesley, 167 U. S. 204; 42 L. Ed. 137;
Carr v. United States, 98 U. S. 433; 25 L. Ed. 209;
Cadwallader v. Harris, 76 Ill. 370;
State v. Cincinnati Tin Co., 66 Ohio St. 182, 64 N. E. 68.

These cases hold in substance that the record in the Milner suit does not estop the State and will not be evidence against it for any purpose touching the merits of its claim. The State, not being estopped by the Milner suit, and possessing from the date of the issuance of the certifications the legal title to the lands, this petitioner cannot lawfully be deprived of purchasing in good faith for a valuable consideration, property from the legal holder. The decision, however, deprives petitioner of this right, and virtually outlaws it from engaging in legitimate business.

6. The decision of the Court of Appeals, in holding that Section 8 of the Act of March 3, 1891, does not apply in favor

of the State because the suit is one to have the land impressed with a constructive trust, or because it is in aid of a former decree, is untenable and in conflict with the great weight of authority, and in conflict with the applicable decisions of this Court, and in conflict with the general law, because this Statute of Limitations gives a right meritorious in character, and its application does not depend upon the character of the remedy adopted or the nature of the forum chosen, and the rights created by it cannot be sacrificed to any mere form of remedy selected by the complainant.

United States v. Whited, 246 U. S. 552, 62 L. Ed. 879;
United States v. Winona, 165 U. S. 463, 41 L. Ed. 789;
United States v. Oregon Lumber Co., 260 U. S. 290, 67 L. Ed. 261;
United States v. Chandler-Dunbar Co., 209 U. S. 447, 52 L. Ed. 881;
Robison v. Hook, 4 Mason, 139, 20 Fed. Cas. 1017 (1826).

(Opinion of Justice Story: Statute of Limitations bar against constructive trusts.)

Elmendorf v. Taylor, 10 Wheat. 152, 6 L. Ed. 289;
Kane v. Bloodgood, 7 Johnson's Chancery 90, 11 Am. Dec. 417;

(Opinion by Justice Kent.)

New v. Smith, 86 Kan. 1, 119 Pac. 380.

(Substance and not form of action decisive in the application of a statute.)

Campbell v. Dick, 157 Pac. 1062 (Okla.);
Newson v. Board, 103 Ind. 526, 3 N. E. 163;
Speidel v. Henrici, 120 U. S. 377, 30 L. Ed. 718;
Carroll v. Green, 92 U. S. 509, 23 L. Ed. 738.

These authorities, it is believed, establish the proposition that a statute of limitations, although in form barring a

remedy, in substance creates a right, the existence of which cannot be avoided by choosing one form of a remedy as contradistinguished from another. The application of the bar created by the statute is not prevented by the fact, if it be a fact, that the proceeding is in aid of a former decree, where such proceeding brings in a new party.

Davey v. Dodge, 213 Fed. 722 (8th C. C. A.)

(It is difficult to see how there can be an affirmation of the certifications if such affirmation is immediately followed with the creation of a constructive trust, accompanied by an order for reconveyance. (See opinion of Circuit Judge Carland in Davey v. Dodge, 213 Fed. 729.)

7. It is apparent from the opinion of the Circuit Court of Appeals rendered in this case, and the opinion rendered by the same Circuit Court of Appeals in the case of United States v. Amalgamated Sugar Company, decided March 5, 1931, that said Circuit Court of Appeals was in grave doubt or, to quote from one of the opinions, "had serious misgivings" about the determination of the question of law as to the application of Section 8 of the Act of March 3, 1891, and that "if this statute is to serve the purpose for which it was passed, it would seem that it should not be circumvented by asking for the same relief in a different form of action". (Quoting from Circuit Judge McDermott's opinion in the Amalgamated case.)

8. The decision of the Circuit Court of Appeals has misinterpreted the action as between the State of Utah and the United States, in holding that the suit as between said parties was in aid of a former decree, because it is apparent from the Counter-claim of the United States (R. 68) and the reply of the State (R. 87-89) that as between such parties the controversy is one of an original character to cancel the certifications made by the United States to the State of Utah pursuant to the Enabling Act. The ownership of these certifications and of the title conveyed by them was vested in the State of Utah at the time of the Milner suit, and for many years after the date of the decree in that suit, and could not have been adjudged or determined in such suit, because the State of Utah was not a party thereto. To reach that subject required an original suit, as contradistinguished from

one of an ancillary character. The counter-claim of the United States and the reply of the State constitutes an original suit.

9. It is apparent from the opinion of the Court in the case at bar, and especially from the opinion in the case of United States v. Amalgamated Sugar Company, decided by the Circuit Court of Appeals of the Tenth Circuit on March 5, 1931, that said Circuit Court of Appeals, in holding that the Statute of Limitations did not apply because the suit was one to impress the land involved with a constructive trust, erroneously relied upon two decisions of this Court: Lockhart v. Leeds, 195 U. S. 427; United States v. New Orleans Pacific Ry., 248 U. S. 507, when neither of such cases can by any possibility affect the question being presented. Where the Government brings a suit to protect the rights of third parties, of course the statute does not apply.

10. It is believed that the decree of the Circuit Court of Appeals ignores the general rule of law conceded everywhere, that in the absence of statute to the contrary, a purchase money mortgage has priority over a previously docketed judgment against the mortgagor, and when the Circuit Court of Appeals subordinated the State's mortgage to the judgment and decree rendered against your petitioner, in 1914, it failed to appreciate that the legal and practical effect of the transaction between the State and your petitioner was to convey to the latter company an equity of redemption only, and leave the title to the land in the State. (41 C. J., pages 458 and 528, Sections 352 and 470 of Mortgages.)

11. It appears that the certifications were not tainted with any fraud at the time they were made, and that, according to the then existing standards, their validity was beyond attack. It is believed that the Circuit Court of Appeals, by its decree, has, in violation of fundamental principles generally accepted, transformed an act, honest when done, into a fraudulent one, by a retroactive application of a technical rule first declared by this court long after the date of said certifications.

12. The original applications to select the lands involved and the contracts to purchase them were entered into between the years 1901 and 1904. The alleged fraudulent applicants

are long since deceased. These contracts were transferred to your petitioner, and were subsequently declared fraudulent and cancelled. Petitioner, more than six years thereafter, finding that the State of Utah claimed and was in possession of these lands, entered into a new, and independent, contract to purchase them and received a State patent therefor. Four years thereafter the Government, (wrongfully assuming that this purchase was under the original contracts to which your petitioner was not a party), sought by the present suit to impress a trust in favor of the United States upon said lands, and to thereby, deprive your petitioner of the lawful benefits of its contract, and to at the same time deprive the State of Utah of its purchase price,—this in clear violation of fundamental principles of law and the decisions of this Honorable Court cited above.

13. The decision rendered in the original Milner suit cancelled the first contracts of purchase from the State of Utah. This petitioner acquired no rights or benefits by reason of those contracts. For the Circuit Court of Appeals, to now hold that because these original contracts were cancelled your petitioner was forever outlawed and deprived of the right to at any time thereafter, by a new independent contract, free from fraud, purchase said lands from the legal holder, is a proposition to which we cannot subscribe. It is in conflict with the general law, and in violation of the decisions of this Court. The decree of which a review is sought is such an extraordinary departure from the usual course of judicial proceedings that the writ prayed for should be granted.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Tenth Circuit, commanding said Court to certify and send to this Court, on a day designated for its review and determination, a full and complete transcript of the record and all proceedings in the United States Circuit Court of Appeals had in said cause entitled "Carbon County Land Company, appellant, v. the United States of America, Independent Coal & Coke Company, a corporation, and the State of Utah, Intervenor, Appellees, No. 253", to the end that said cause may be reviewed and determined by this Court as provided by law, and that said judgment of the

United States Circuit Court of Appeals for the Tenth Circuit herein may be reversed, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

And your petitioner will ever pray.

CARBON COUNTY LAND COMPANY,
a corporation,

By SAMUEL A. KING,

Attorney for Carbon County Land Company.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

STATEMENT.

The United States appealed from the decree of the District Court of the United States for the District of Utah, to the Circuit Court of Appeals of the Tenth Circuit (Case No. 248). From the same decree your petitioner, Carbon County Land Company, also appealed (Case No. 253). These appeals were heard and considered together, and the Court of Appeals, on January 14, 1931, rendered one decision disposing of both appeals. From the opinion rendered the State of Utah has filed its petition for a writ of certiorari, together with its supporting brief. The Independent Coal & Coke Company joined in the petition filed by the State of Utah, and requested that the same be granted. The same fundamental questions being involved in the two appeals, and the decision of the Circuit Court of Appeals being adverse to the State of Utah and to your petitioner, Carbon County Land Company, the latter, heretofore filed in this Court its statement joining in the petition of the State of Utah, and requested that the same be granted as prayed for.

In addition to the request filed on behalf of the State of Utah, your petitioner now presents its independent petition for a writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit.

An examination of the two petitions will conclusively demonstrate that the same fundamental questions are involved in each petition, and that the brief and argument in support of the petition filed by the State of Utah apply with equal force and effect in support of the petition filed by your petitioner, Carbon County Land Company.

PETITIONER ADOPTS THE BRIEF AND ARGUMENT FILED ON BEHALF OF THE STATE OF UTAH.

Petitioner, in order to avoid encumbering the record, and for the reasons stated above, does now hereby adopt the brief and argument filed by the State of Utah in support of its petition for a writ of certiorari, and respectfully requests that the statement, specification of errors, arguments, and

cases cited, beginning on page 17 to and including page 36 of said brief and argument, may be considered as filed and presented by your petitioner, Carbon County Land Company, and given full and proper application in support of the petition filed.

THE GOVERNMENT CERTIFICATIONS VESTED THE LEGAL TITLE IN THE STATE OF UTAH.

The original Milner suit was not brought to divest the State of Utah of its title. This was the interpretation placed on the bill by Mr. Maynard, Special Assistant to the Attorney General, who commenced and conducted the action. He stated to the State Land Board at the time of the filing of the suit, that "the State of Utah has purposely not been made a party to this bill. * * * The only relief we ask is that you be relieved from your contract entered into with the Milners. *That the legal title to the land is in you now, and if the Government is successful will be in the State of Utah. We do not seek to deprive you of these lands.* * * * *The legal title remains in the State.*" (R. 47-8)

The first suit was filed January 7, 1907. After the case was tried the Trial Court withheld its decision four and one-half years until after the decision was rendered in the Diamond Coal & Coke Company case, and then on January 9, 1914, the decree was filed. This decree was later affirmed by the Circuit Court of Appeals for the Eighth Circuit, November 15, 1915. During the pendency of this action no attempt was made by the Government to assert title to the land as against the State of Utah. After the decree was affirmed no claim was made or asserted that the Government possessed either the legal or equitable title, until after the filing of this action on May 16, 1924.

Plaintiff's amended bill admitted that the legal title still remained in the State. Its answer to the petition in intervention filed by the State admits this fact. It was never claimed that the legal title has not rested in the State of Utah since the certifications were made. It is admitted that the Government never at any time asked the State to cancel these certifications until it filed its answer to the complaint in intervention February 6, 1929, more than 25 years after the last certification was made, and 22 years after the Assistant

to the Attorney General stated, "that we (United States) do not seek to deprive you of these lands." (R. 47)

Legal title to these lands was transferred to the State of Utah by certifications having the same effect as Government patents. No fraud was at any time charged against the State or its officials in securing these certifications.

After the first Milner decision, no change was made upon the Government books, maps, or plats, evidencing ownership in the Government. The Government officials possessed full knowledge that legal title to these lands rested in the State. The State possessing this knowledge, and knowing that the Statute of Limitations had run in its behalf, and that under numerous decisions of this Court its title was secure, sold these lands and executed its patent therefor.

If the Statute of Limitations and the decisions of this Court rendered construing it are to be given any effect, then the State on February 10, 1920, had a good title to convey, and if it did, can it then be said that there were any facts present which would have the effect of transforming the perfect title in the State into a bad title, or a title in trust in its grantee?

PURPOSE OF STATUTE OF LIMITATIONS.

"The effect of the statute was to make good the title conveyed by the United States."

United States v. Chandler-Dunbar Water Co., 209 U. S. 447;
United States v. Whited & Wheless, 246 U. S. 542-563.

The decree in the first Milner suit did not affect the title of the State as the State was not a party to that action. It did not deprive the State of such title as it then had, and that title was such that it ripened into a good title by the operation of the Statute of Limitations, regardless of the character of the land and the means by which the State procured the title.

Stockley v. United States, 260 U. S. 532-543.

At any time within six years from the date of the certifications issued to the State, the United States could have brought suit to annul the certifications and to regain title.

Burke v. S. P. Ry. Co., 234 U. S. 669-692-3.

Not having seen fit to do this, the certifications, after the lapse of the statutory period, became conclusive. That is the very object of the statute.

Cramer v. United States, 261 U. S. 219-233-4;
Winona & St. Peter R. Co. v. United States, 165 U. S. 463.

In the Winona case, speaking of this Statute of Limitations, the court said:

> "'That when its proper officers, acting in the ordinary course of their duties, have conveyed away lands which belonged to the Government, such conveyances should after the lapse of the prescribed time, be conclusive against the Government, and this notwithstanding any errors, irregularities or improper action of its officers therein."

It was further stated:

> "Under the benign influence of this statute, it would matter not what the mistake or error of the land department was, what the fraud and misrepresentations of the patentee were, the patent would become conclusive as a transfer of the title, providing only that the land was public land of the United States and open to sale and conveyance through the Land Department."

The purpose of this Statute of Limitations was said by this Court in United States v. Whited & Wheless, supra, to be, "to promote prompt action for annulling patents where cause therefor was believed to exist, and to make titles resting upon patents dependably secure when the period of limitations should expire", it was "that patent title might be made secure." (652-3)

And in Cramer v. United States, supra, the Court said that the object of the statute was "to extinguish any right the Government might have in the lands."

It is true that the statute does not expressly refer to suits to annul titles other than titles conveyed by patent, but titles conveyed by certification are clearly within the intent and purpose of the Act. (United States v. Whited & Wheless, supra.)

Under the well established practice of the Land Department, lands selected by a state are conveyed to the state, not by patent, but by certification, and as shown above, such certification is equivalent to a patent.

It was said by this Court in Shaw v. Kellogg, 170 U. S. 312, 351, that

> " • • • The significance of a patent is that it is evidence of the transfer of the legal title. There is no magic in the word patent, or in the instrument which the word defines. By it the legal title passes, and when by whatsoever instrument, and in whatsoever manner that is accomplished, the same result follows as though a formal patent were issued."

The Government's remedies are clearly set forth by Mr. Justice Clark in Whited v. Wheless, supra, where he says that,

> "When patent has been issued through mistake or inadvertence, or has been patented by fraud, the Government has the right to bring one or two causes of action—one to cancel and annul the patent or certification, if issued by mistake or inadvertence, and this must be brought within the period of limitation fixed by the Act of 1891, or within the period fixed by the Act if the action is for fraud in patenting the title, or within the same period after discovery of such fraud; or it may bring an action to recover the value of such lands, provided it has not made such an election as is mentioned in the case of the United States v. Oregon Lumber Company, 260 U. S. 290."

In this case the Government did not pursue either of these remedies.

CERTIFICATIONS NOT FRAUDULENT.

As stated in the brief filed on behalf of the State of Utah:

> "The certifications obtained by the State from the United States were not fraudulent because, according to the standard of law existing at the time such certifications were made by the United States to the State, the lands involved are non-mineral in character. It became mineral in character only by reason of the change in the law made 10 years after said certifications. The standard existing at the time the certifications were made should have been applied."

The Court in determining the conduct of the Milners between the years 1901 and 1904, did not apply to their conduct the existing legal standards then in existence, but applied another legal standard not created or conceived until 1914, and by so doing, through a retroactive application of the new standard, transformed an honest act into a fraudulent one.

The opinion rendered by the Circuit Court of Appeals states that

> "there was no exposure of commercially valuable coal on any subdivision of the land selected," and until the decision in the Diamond Coal & Coke case,
>
> "many lawyers and some courts believed that such an exposure was an essential to the listing of lands as mineral. The rule promulgated by the Commissioner of the General Land Office and decisions of the Land Office were to that effect."

It was under the rule promulgated by the Commissioner of the General Land Office and the numerous land decisions that the Milners selected the land in question. They were acting honestly in obtaining the lands by the only method at that time open to them under the law. And this rule was not changed until the decision rendered in the Diamond Coal & Coke case in April, 1914, and then a retroactive application of the new rule made that which was honest at the time of its commission fraudulent ten years later.

In discussing changes of this character, Circuit Judge Sanborn, in the case of Clancey v. Barker, 131 Fed. 161 (8th Circuit, 1904), at page 171, uses this language:

> "A retroactive decision which makes and applies a new rule of law, and attaches another and unforseen liability to a contract after its execution, is as vicious as an ex post facto statute."

THE GOVERNMENT SEEKS TO BASE ITS RIGHT OF RECOVERY AGAINST PETITIONER BY REASON OF THE INJUNCTIVE RELIEF GRANTED IN THE ORIGINAL ACTION.

In the 1907 suit the Government only prayed for the cancellation of the contracts entered into by the Milners with the State of Utah, and for general relief (Gov. T. of R. 201). There was no prayer for injunctive relief, or any demand to quiet the Government's title in the land as against the defendants. The decree rendered, however, makes no reference to the cancellation of the contract, but decrees that the Government is the owner and entitled to the possession of the land, and enjoins petitioner from making any claim to the premises. (R. 3). This decree was unauthorized, and violates the well established principle of pleading and the law applicable thereto. Upon this decree, rendered not in keeping with the issues in that case or the prayer of the bill, the Government now claims that petitioner is perpetually enjoined from acquiring any title to the lands involved. We insist that the decree was void in this respect, and furnishes no authority for the Government's contention.

> "Every decree in a suit in equity must be considered in connection with the pleadings; and if its language is broader than it is required, it will be limited by construction so that its effect shall be such, and such only, as it needed for the purposes of the case that has been made."

Barnes, Trustee v. Chicago M. & P. R. Co., 122 U. S. 1;
Reynolds et al. v. Stockton, Receiver, 140 U. S. 254;
Clark v. Arizona Ass'n., 217 Fed. 640;
Cushman et al. v. Warren Paving Co., 220 Fed. 857.

The prayer for relief is an essential part of the bill in equity, and relief not affirmatively sought will not be granted. The relief granted must conform to the prayer whereby the party indicates to the court the relief which he demands upon his allegations.

> "It is often stated generally as an established doctrine that under the general prayer, relief inconsistent with that asked for by the special prayer cannot be granted."

21 C. J. 683 (Cases under note 79);

Hobson v. McArthur, 16 Pet. 182, 10 L. Ed. at page 934;

Boone et al. v. Chiles et al., 10 Pet. 177, 9 L. Ed. 388;

Hayward v. Elliott Nat'l Bank, 90 U. S. 611, 24 L. Ed. 855;

English v. Foxall, 2 Pet. 595, 7 L. Ed. 531.

Story in discussing the extent to which an injunction will be granted under the general prayer, states:

> "Thus for example an injunction will not ordinarily be granted under a prayer for general relief; but it must be expressly prayed."

Story Eq. Pl. 9th Ed., Sec. 41, p. 35.

The granting of injunctive relief in the original bill was not prayed for. At that time petitioner did not own the land involved. It had merely a contract for purchase. This contract was declared fraudulent. No rights were ever acquired under it. Petitioner did not enter into the original contract, but became merely the assignee of it. Years thereafter in a new separate and independent contract it purchased these lands from the then legal holder. To now say that by virtue of the original decree petitioner was forever outlawed in respect to the acquiring of these lands in a legal and lawful manner, we insist was violative of petitioner's legal rights.

CONCLUSION.

Petitioner, feeling that its rights under the law have not been fully or properly considered and adjudicated, now submits this petition for the writ, and earnestly urges that it be granted as prayed for.

Respectfully submitted,

SAMUEL A. KING,

Attorney for Carbon County Land Company.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931

No. 48

CARBON COUNTY LAND COMPANY,
a corporation,

Petitioner.

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF FOR THE CARBON COUNTY LAND COMPANY, PETITIONER.

SAMUEL A. KING,
Attorney for Carbon County Land Company.

PARNELL BLACK,
Of Counsel.

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STIPULATION.

It was stipulated by Petitioner and Respondent that the printing of the record from the Tenth Circuit Court of Appeals be waived, and that this cause be heard, argued and considered upon the printed record in the case of State of Utah, Petitioner vs. United States of America, Respondent, No. 42, which record contains all pleadings, facts and proceedings necessary for the determination of this action, and that the stipulation be printed and included in the record. (R. 630-631)

JURISDICTION.

The decree of the Circuit Court of Appeals was entered January 14, 1931. (R. 626) Petition for writ of certiorari was granted May 18, 1931 (R. 630) pursuant to Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. (U. S. C. Title 28, Sec. 347)

HISTORY OF THE LITIGATION.

The Utah Enabling Act was passed July 16, 1894 (28 Stat. 107), and Utah was admitted into the Union January 4, 1896. By this Act a large acreage of land was granted the state for educational and other purposes. Section 13, provides,

> "That all land granted in quantity or as indemnity by this Act shall be selected under the direction of the Secretary of the Interior from the unappropriated public lands of the United States within the limits of the State of Utah."

To secure these lands from the government, the legislature of Utah in 1896 created a "State Land Board", and gave to it the direction, control and management of the granted lands. (Laws of Utah, 1896, C. 80) Selections were thereafter made upon applications from proposed purchasers. These selections were made upon forms provided by the government and certified to the land department officials in accordance with its then rules and regulations. Acting in conformity therewith and the laws applicable thereto, Stanley B. Milner for himself and as agent for Truth A. Milner, and Harley O. Milner, and Samuel H. Gilson in person, between September 10, 1900, and September 14, 1903, made application to the State Land Board to select 5564.28 acres the land involved, and entered into agreements to purchase them from the State as agricultural lands, for $1.50 an acre. These selections were approved and certified to the State of Utah by the Secretary of the Interior prior to December 1, 1904.

FIRST SUIT.

January 7, 1907, the government filed its original bill against Truth A. Milner, executrix of the estate of Stanley B. Milner, deceased, Truth A. Milner, Harley O. Milner, Samuel H. Gilson, Carbon County Land Company, a corporation, and Peter M. Campbell. (R. 175)

September 26, 1907, a second amended bill against all of the defendants except Harley O. Milner was filed. (R. 195)

This cause was tried during January, 1910, and taken under advisement until January 8, 1914, when a decree was rendered in favor of the government.

Defendants thereupon appealed to the Circuit Court of Appeals for the Eighth Circuit, and on November 15, 1915, the decree was affirmed. (228 Fed. 431)

The appeal to the Supreme Court of the United States was dismissed for want to prosecution. (248 U. S. 594)

No further proceedings were taken in respect to these lands until January 2, 1920, when the State of Utah entered into a new and independent contract with the Carbon County Land Company whereby the State agreed to sell and the company to buy 5564.28 acres at $100.00 per acre. The company executed and delivered to the State three promissory notes, one for $100,000.00 due January 2, 1930, one for $200,000.00 due January 2, 1940, and one for $215,428.00 due January 2, 1950, each bearing interest at five per cent per annum after January 2, 1925, and then executed its mortgage thereon to secure the purchase price. The State in fulfillment of its agreement, on February 10, 1920, executed and delivered its patent. (R. 41-573, 575)

Petitioner immediately entered into the possession of the lands, and thereafter on the 16th of October, 1920, sold to the Independent Coal & Coke Company 1120 acres.

SECOND OR PRESENT SUIT.

On May 16, 1924, respondent filed an original bill in equity against the Carbon County Land Company, the Independent Coal & Coke Company, and Carbon County. Defendants moved to dismiss the bill claiming that the relief demanded was barred by the provisions of Section 8 of the Act of March 3, 1891.

January 12, 1925 an order issued sustaining the motion and a decree was entered dismissing the bill. (Original Tr. 24)

From this decree respondent appealed to the Circuit Court of Appeals for the Eighth Circuit. February 21, 1925, that Court rendered its decree reversing the judgment of the District Court. (9 Fed. (2d) 517)

Defendants then applied to this Court for a writ of certiorari.